Cite as Det. No. 04-0132, 24 WTD 254 (2005)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund and Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 04-0132
. . .	)	Registration No. . . .
	)	Document No. . . .
	)	Audit No. . . .
	)	Docket No. . . .

[1] RULE 105; RCW 82.04.360: RETAILING B&O TAX – RETAIL SALES TAX – INDEPENDENT CONTRACTOR VS. EMPLOYEE OR SERVANT – CATERER A person claiming to be a "personal chef" or "domestic servant" was found to be an independent contractor engaged in a catering business where the person was hired to plan and organize social events in private homes, and was responsible for food and beverage arrangements, hiring additional wait staff, renting equipment, and ordering flowers.

[2] RCW 82.32.070: TAX PAID AT SOURCE – RECORDS – FAILURE TO MAINTAIN. A person who did not maintain invoices separately stating retail sales tax was not entitled to a presumption that retail sales tax was paid on taxable purchases, even though the person did maintain credit card receipts showing the total amounts paid, which ended in uneven cents suggesting the that total price included retail sales tax.

[3] RULE 119, RULE 244; RCW 82.08.0293: RETAIL SALES TAX – FOOD PREPARATATION. A person who prepared and served food in private homes for consumption by household members and their guests was not required to have a food and beverage service worker's permit under RCW 69.09.010, and was therefore not required to collect retail sales tax under the food products exemption in effect prior to January 1, 2004.

Rosenbloom, A.L.J. – . . . (Taxpayer) petitions for correction of an assessment of retailing business and occupation (B&O) tax and retail sales tax on amounts received from preparing and serving food in private homes, and related services, arguing that he is a domestic servant and therefore not subject to B&O tax. Taxpayer also petitions for a refund of B&O tax allegedly

paid in error during the audit period. Taxpayer's petition for correction of assessment is granted in part and denied in part. Taxpayer's petition for refund is denied.[1]

ISSUES

1. Is a person who prepares and serves food at social events hosted in private homes an "employee or servant" or an independent contractor engaged in a catering business?
2. . . .
3. Is a person who prepares and serves food in private homes for consumption by household members and their guests required to collect retail sales tax?
4. Is a person entitled to a presumption that retail tax was paid on taxable purchases when the person does not have invoices separately stating the retail sales tax, but the person does have credit card receipts for amounts ending in uneven cents suggesting that the total price included retail sales tax?

FINDINGS OF FACT

Taxpayer prepares and serves food in private homes for consumption by household members and their guests, typically for large social events, such as dinner parties, cocktail parties, engagement parties, weddings, and receptions. Taxpayer also shops for groceries, purchases beverages, hires service people, rents equipment, and orders flowers for the events. Taxpayer charges the customer an hourly rate for his own labor. Taxpayer bills other expenses to his customer at cost with no mark-up.

Taxpayer works for a small group of customers. About ninety-two percent of his business is with seven individuals, five of whom are members of the same family. The other two are close friends of the family. Taxpayer's customers did not withhold payroll taxes from amounts paid to Taxpayer.

The Department's Audit Division (Audit) examined Taxpayer's books and records for the period July 1, 1999 through March 31, 2003, and issued a tax assessment for additional taxes and interest. During the Audit period, Taxpayer paid Retailing B&O tax on his hourly charges. Taxpayer did not report amounts received for purchasing groceries and beverages, hiring service people, renting equipment, and ordering flowers, which he referred to as "pass through" expenses. Nor did Taxpayer collect retail sales tax from his customers. Audit concluded that Taxpayer was taxable as a caterer and was subject to Retailing B&O tax on gross amounts charged to his customers. Audit also concluded that Taxpayer was liable for uncollected retail sales tax on gross amounts charged to his customers. Audit allowed a credit for retail sales tax paid on beer and wine purchases.

Taxpayer argues that he is a domestic servant, or personal chef, working for a small circle of individuals and is therefore not subject to B&O tax. Taxpayer explains that he is registered with the Department only because he previously operated a bakery. Taxpayer claims that the B&O

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

taxes paid during the audit period on his earnings as a domestic servant were paid in error and should be refunded.

. . .

Taxpayer also contends that he is entitled to additional credit for retail sales taxes paid at source. . . .

Taxpayer no longer has invoices separately stating the retail sales tax; however, he does have credit card receipts showing the gross amount paid. These credit card receipts typically are in amounts ending in uneven cents, suggesting that they included retail sales tax. . . . Taxpayer argues that Audit should have accepted credit card receipts for amounts ending in uneven cents as reasonable evidence under the circumstances that retail sales tax was paid.

Finally, Taxpayer asserts that he was not required to have a food and beverage service workers permit, and was therefore not required to collect retail sales tax on sales of exempt food products.

ANALYSIS

[1] The B&O tax is imposed on every person[2] who engages in business[3] in Washington. RCW 82.04.220. However, RCW 82.04.360 provides in part:

> (1) This chapter shall not apply to any person in respect to his or her employment in the capacity of an employee or servant as distinguished from that of an independent contractor.

The terms "employee," "servant," and "independent contractor" are not defined in Title 82 RCW. WAC 458-20-105 (Rule 105) contains criteria for distinguishing an "employee" from a person "engaging in business"; however, the rule does not mention the term "servant."

Taxpayer does not contend that he is an "employee" of his customers, but argues instead that he is a domestic "servant" and thus entitled to the exemption. We disagree. Taxpayer did not provide any authority for the proposition that a servant is something different than an employee for B&O tax purposes, nor are we aware of any. At least one authority makes the following observation regarding these terms:

> Observation: "Employer" and "employee," the terms commonly used to describe the employment relationship, grow out of the common-law terms "master" and "servant." While the employer-employee relationship is generally the same as the master-servant relationship, the terms "employer" and "employee" are preferable in an industrial age characterized by impersonal employment relationships.

[2] RCW 82.04.030.
[3] RCW 82.04.140; .150.

27 Am. Jur. 2d Employment Relationship § 2 (footnotes omitted).

RCW 82.04.360 was initially enacted in 1935[4] at a time when the term "servant" was probably more common. It is reasonable to assume that the 1935 Legislature's intent was to allow the exemption regardless of whether the parties in the relationship might be more properly described as "employer" and "employee," or "master" and "servant."

One area where the term "servant" persists is in the context of services provided in private homes. Domestic servants are generally excluded from unemployment insurance and workers' compensation laws.[5] Thus, a "domestic servant," though not considered an "employee" for unemployment insurance and workers' compensation purposes, is presumably exempt from B&O tax as a "servant" within the meaning of RCW 82.04.360. We need not decide the issue, however, because Taxpayer is not a "domestic servant" as that term is generally understood.

In *Everist v. State Dep't of Labor and Industries*, 57 Wash. App. 483, 789 P.2d 760 (1990), the court held that the meaning of "domestic servant" for workers' compensation purposes is resolved as a matter of law because it involves defining a statutory term. However, the court cited with approval cases from other jurisdictions explaining the common law meaning of "domestic servant." One such case mentioned in a footnote to the court's decision described a "domestic servant" as follows:

> [A] person hired or employed primarily for the performance of household duties and chores, the maintenance of the home, and the care, comfort and convenience of members of the household.

57 Wash. App. at 486, footnote 5.

Taxpayer clearly is not a "domestic servant"; he is not employed to perform household duties, chores, or maintenance. Nor is he merely a personal chef who prepares and serves meals for the care, comfort, and convenience of family members. To the contrary, Taxpayer is hired to plan and organize large social events. He is responsible not only for the food and beverage arrangements, but also for hiring additional wait staff, renting equipment, and ordering flowers.

Furthermore, the statute distinguishes an "independent contractor" from an "employee or servant." And Rule 105 distinguishes "persons engaging in business" from "employees" as follows:

> (3) **Persons engaging in business.** The term "engaging in business" means the act of transferring, selling or otherwise dealing in real or personal property, or the rendition of

[4] Laws of 1935, Ch. 180, § 11(g).

[5] *See* RCW 50.04.160 (services performed in domestic service in a private home shall not be considered services in employment for purposes of unemployment insurance), RCW 51.12.020(1) (person employed as a domestic servant in a private home by an employer who has less than two employees regularly employed forty or more hours a week in such employment is not subject to mandatory coverage under workers' compensation laws).

services, for consideration except as an employee. The following conditions will serve to indicate that a person is engaging in business.

If a person is:

(a) Holding oneself out to the public as engaging in business with respect to dealings in real or personal property, or in respect to the rendition of services;
(b) Entitled to receive the gross income of the business or any part thereof;
(c) Liable for business losses or the expense of conducting a business, even though such expenses may ultimately be reimbursed by a principal;
(d) Controlling and supervising others, and being personally liable for their payroll, as a part of engaging in business;
(e) Employing others to carry out duties and responsibilities related to the engaging in business and being personally liable for their pay;
(f) Filing a statement of business income and expenses (Schedule C) for federal income tax purposes;
(g) A party to a written contract, the intent of which establishes the person to be an independent contractor;
(h) Paid a gross amount for the work without deductions for employment taxes (such as Federal Insurance Contributions Act, Federal Unemployment Tax Act, and similar state taxes).

(4) **Employees.** The following conditions indicate that a person is an employee. If the person:

(a) Receives compensation, which is fixed at a certain rate per day, week, month or year, or at a certain percentage of business obtained, payable in all events;
(b) Is employed to perform services in the affairs of another, subject to the other's control or right to control;
(c) Has no liability for the expenses of maintaining an office or other place of business, or any other overhead expenses or for compensation of employees;
(d) Has no liability for losses or indebtedness incurred in the conduct of the business;
(e) Is generally entitled to fringe benefits normally associated with an employer-employee relationship, e.g., paid vacation, sick leave, insurance, and pension benefits;
(f) Is treated as an employee for federal tax purposes;
(g) Is paid a net amount after deductions for employment taxes, such as those identified in subsection (3)(h) of this section.

The rule purports to define "engaging in business" as the performance of various activities for consideration "except as an employee." However, the term "engaging in business" has a specific statutory definition, which is not so limited. Under the broad definitions of "business" and "engaging in business" it is clear that even an employee is "engaging in business." Indeed, there would be no need for a specific B&O tax exemption for servants or employees were this not the case. Accordingly, the term "persons 'engaging in business,'" as used in Rule 105, must be interpreted to mean "engaging in business as an independent contractor."

Taxpayer holds himself out to the public as an event planner and caterer; the fact that most of his time is spent working for a relatively small circle of customers is immaterial. A person is no less an independent contractor merely because he works for a small or exclusive clientele. Furthermore, while seven individuals account for about ninety-two percent of Taxpayer's business, presumably the other eight percent is made up of working for the public at large.

The fact that Taxpayer is responsible for hiring and supervising wait staff and for filing his own statement of business earnings and expenses for federal tax purposes is consistent with the finding that he is an independent contractor. Conversely, the fact that Taxpayer is not treated by his customers as an employee for federal income taxes or entitled to any fringe benefits is inconsistent with the status of an employee or servant.

We conclude that the taxpayer is an independent contractor, and is therefore not an employee or servant for purposes of RCW 82.04.360 and Rule 105.

. . .

[2] Taxpayer argues he is entitled to additional credits for retail sales tax paid at source. Audit allowed a credit for retail sales tax paid at source for beer and wine; however, for all other items, Audit allowed a credit for tax paid at source only in those limited instances in which Taxpayer still had a sales invoice documenting payment of tax.

First, we most note that Taxpayer is not necessarily entitled to a credit for retail sales tax paid on all of the items purchased in connection with his business. For example, no credit is available for retail sales or use tax paid on linens, tableware, glassware, and similar durable items purchased or rented by the Taxpayer and used by him in rendering his catering services. Determination No. 93-259, 14 WTD 029 (1994).

Taxpayer is entitled to a credit for retail sales tax paid at source on tangible personal property purchased by Taxpayer for resale to his customers in the regular course of business without intervening use, such as beer and wine. Likewise, Taxpayer may receive a credit for retail sales tax paid at source on articles furnished to his customers, the first use of which renders such articles unfit for further use, such as paper plates, paper cups, paper napkins, and toothpicks. WAC 458-20-119(4)(e) (Rule 119(4)(e)). Flower arrangements and ice sculptures would also fall in this category. Determination No. 93-259, 14 WTD 029 (1994). In all instances, however, a claim for a credit for retail sales tax paid at source must be supported by adequate documentation showing that retail sales tax was in fact paid.

Taxpayer contends that he should be entitled to a presumption that retail sales tax was paid in cases where he can produce a credit card receipt ending in an uneven amount, suggesting that the total charge included sales tax. We disagree. RCW 82.32.070 requires taxpayers to preserve suitable records for a period of five years, and a taxpayer who fails to comply is not entitled to dispute the correctness of any assessment.

Taxpayer failed to preserve sales invoices showing that retail sales tax was paid. We do not agree that a credit card receipt for an amount ending in uneven cents is a reliable indication that the total includes retail sales tax.

[3] Finally, we consider whether Taxpayer's gross charges are subject to retail sales tax. Rule 119 explains the application of B&O and retail sales and use tax to sales of meals. The rule provides that sales of meals and prepared food by caterers are subject to Retailing B&O tax when sold to consumers. Rule 119(2)(a)(ii). The rule also defines "caterer" as a person who provides, prepares, and serves meals for immediate consumption at a location selected by the customer. *Id*.

The Department of Health's rules define "caterer" differently for regulatory purposes. Under WAC 246-215-010(9), "'Caterer' means a person or food service establishment contracted to prepare food in an approved facility for final cooking or service at another location." Taxpayer does not prepare food at one location for final cooking or service at another location. The entire operation is performed in the homes of his customers. Nevertheless, this definition is not relevant for B&O tax purposes. We find that Taxpayer is a caterer for B&O tax purposes under Rule 119, and his gross receipts are therefore subject to Retailing B&O tax.

For retail sales tax purposes, however, there is a material distinction between Taxpayer's business and that of a traditional "caterer" as that term is defined for regulatory purposes. Sales of meals by a "caterer" as defined in WAC 458-215-010(9) are typically subject to retail sales tax because the caterer is required to have a food and beverage service worker's permit under RCW 69.06.010.

RCW 82.08.0293 provides a retail sales tax exemption for sales of food products for human consumption; however, the statute provides in part:

> (2) The exemption of "food products" provided for in subsection (1) of this section shall not apply: . . .(c) to a food product, when sold by the retail vendor, which by law must be handled on the vendor's premises by a person with a food and beverage service worker's permit under RCW 69.06.010 . . . .

[However,] under chapter 69.06 RCW and the implementing regulations in chapter 246-217 WAC, it is clear that a person whose only activity is preparing or serving food in private homes for consumption by household members and/or their guests is not required to have a food and beverage service worker's permit.

In Det. No. 89-241, 7 WTD 317 (1989), we held that a person who prepared and served meals in the home of an elderly couple was required to collect retail sales tax . . . .

[However, b]ecause Taxpayer prepares and serves food for consumption exclusively in private homes for consumption by household members and/or their guests, he is not required to have a food and beverage service worker's permit. We conclude that sales of food products under such

circumstances are exempt under the food products exemption provided in RCW 82.08.0293. To the extent Det. No. 89-241 reaches a different result, it is hereby overruled.

Finally, we wish to advise Taxpayer that RCW 82.04.0293 was amended by Laws of 2003, Ch. 168, § 301, effective January 1, 2004. As amended, the food products exemption no longer uses the food and beverage service worker's permit as a criterion for the food products exemption. Instead, "prepared food" is excluded from the food products exemption as follows:

> (2) The exemption of "food and food ingredients" provided for in subsection (1) of this section shall not apply to prepared food, soft drinks, or dietary supplements.
>
> (a) "Prepared food" means:
>
> (i) Food sold in a heated state or heated by the seller;
>
> (ii) Two or more food ingredients mixed or combined by the seller for sale as a single item; or
>
> (iii) Food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport the food.

That is, sales of meals prepared and served in private homes for consumption by household members and/or their guests are taxable sales of "prepared food" effective January 1, 2004, regardless of the fact that the seller is not required to have a food and beverage service worker's permit.

DECISION AND DISPOSITION

Taxpayer's correction of assessment is granted in part and denied in part. Taxpayer's petition for refund is denied.

Dated this 28th day of May 2004.